

Vet. App. No. 17-306

**IN THE UNITED STATES COURT
OF APPEALS FOR VETERANS CLAIMS**

ROBERT E. SCHMOKER,
Appellant,

v.

DAVID J. SHULKIN, M.D.,
Secretary of Veterans Affairs,
Appellee.

**ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS**

**BRIEF OF THE APPELLEE,
SECRETARY OF VETERANS AFFAIRS**

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Secretary of Veterans Affairs,)	
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Appellee.)	

**ON APPEAL FROM THE
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BRIEF OF THE APPELLEE

I. ISSUE PRESENTED

Whether the Court of Appeals for Veterans Claims (Court) should affirm the Board of Veterans Appeals' (Board) October 7, 2016, decision denying entitlement to service connection for bilateral hearing loss and tinnitus.

II. STATEMENT OF THE CASE

A. JURISDICTIONAL STATEMENT

Jurisdiction is based upon 38 U.S.C. § 7252(a), which grants the U.S. Court of Appeals for Veterans Claims exclusive jurisdiction to review final decisions of the Board of Veterans' Appeals.

B. NATURE OF THE CASE

Appellant, Robert E. Schmoker, seeks the Court's review of an October 7, 2016, Board decision that denied his claims of entitlement to service connection for bilateral hearing loss and for tinnitus, to include as due to bilateral hearing loss. [Record Before the Agency [R.] at 2-15].

C. STATEMENT OF THE FACTS

Appellant served on active duty from October 1961 to October 1963. [R. at 291]. At entry to service, Appellant was not provided with an audiogram, but a "whisper test" revealed normal results bilaterally. [R. at 297 (296-97)]. At separation from service in September 1963, Appellant underwent audiometric testing. [R. at 301-02]. When converted to ISO/ANSI standards, the audiometric tests produced the following result:

	500 Hz	1000 Hz	2000 Hz	3000 Hz	4000 Hz
RIGHT	25	20	35	X	20
LEFT	25	20	20	X	15

[R. at 302]. The examiner noted, "Deafness partial, one ear." *Id.*

In September 2000, Appellant underwent an audiologic evaluation where he reported decreased hearing in the right ear since 1962, but denied tinnitus. [R. at 396]. The examiner diagnosed mild sensorineural hearing loss through 2000 Hertz with a moderate to severe loss from 3000 to 8000 Hertz in the right ear, and hearing within normal limits through

1000 Hertz with a mild to moderate sensorineural hearing loss from 2000 to 8000 Hertz in the left ear. *Id.* Appellant expressed he was not interested in hearing aids. *Id.*

In December 2011, Appellant was treated for cerumen buildup. [R. at 398]. At a follow up examination in February 2012, he reported decreased hearing since service, with the right ear having greater noise exposure in service. [R. at 410-15]. He reported gradual onset/progression of hearing loss, with a decrease in hearing since his September 2000 evaluation. [R. at 413].

In February 2012, Appellant filed a claim for service connection for bilateral hearing loss and bilateral tinnitus. [R. at 349].

In April 2013, Appellant underwent an audiology consult where he complained of hearing loss, which he first noticed two years earlier. [R. at 404-05]. Otoscopy revealed partially occluded ears with cerumen, bilaterally. [R. at 404].

Following an August 2013 VA examination and September 2013 addendum opinion, the Regional Office denied entitlement to service connection for hearing loss and tinnitus. [R. at 275-83]; [R. at 274]; [R. at 266-69]. In November 2013, Appellant filed a Notice of Disagreement with the September 2013 rating decision. [R. at 261-62]. After a May 2014 Statement of the Case continued the denial of Appellant's claims, he perfected his appeal the same month. [R. at 222-43]; [R. at 202].

In April 2015, the Board remanded Appellant's claims for further development. [R. at 155-65]. Having found the subsequent January 2016 examination inadequate for rating purposes, the Board again remanded Appellant's claims. [R. at 57-69]; [R. at 92-97].

In June 2016, the January 2016 examiner provided an addendum opinion. [R. at 70-75]. The examiner noted Appellant's reports of post-service hearing loss were valid, but opined it was less likely than not that Appellant's hearing loss was incurred in service because the separation examination did not reflect hearing loss for VA standards and there was no audiometric data for a period of 37 years, until September 2000, when Appellant again complained of hearing loss and was diagnosed with sensorineural hearing loss. [R. at 71-73]. Without further evidence during the 37 year period that supported a conclusion that the current disability was causally related to service, the examiner provided a negative nexus opinion. [R. at 73].

In October 2016, the Board denied Appellant's claims. [R. at 2-15]. This appeal followed.

III. SUMMARY OF ARGUMENT

The Court should affirm the October 7, 2016, Board decision on appeal. Appellant's arguments do not prove the Board relied upon inadequate VA medical opinions or erred in its application of the relevant law to the evidence of record. The examiner thoroughly detailed his

findings, the records he considered, and provided a rationale for his negative nexus opinion. Additionally, the Board provided an adequate statement of reasons or bases for its weighing of the evidence, including Appellant's lay statements. The Board's assignment of probative value was plausible and Appellant has not shown its denial of entitlement to service connection was clearly erroneous.

IV. ARGUMENT

A. The Court Should Affirm The Board's Decision Because The Board Properly Ensured Compliance With The Duty To Assist As The June 2016 VA Opinion Was Adequate For Rating Purposes.

Appellant asserts the VA examinations of record, including the June 2016 addendum opinion on which the Board primarily relied, are inadequate because (1) the September 2013 and January 2016 VA examinations did not specify whether the examiner converted the audiometric results to ISO/ANSI standards, and (2) the June 2016 examiner relied on the lack of ratable hearing loss upon Appellant's separation from service. Appellant's Brief (AB.) at 19-22. Because the Board relied only on the medical opinion of the June 2016 examiner in its analysis, and because that examiner did not rely solely on the lack of a ratable hearing loss disability at separation from service, Appellant cannot demonstrate a failure to comply with the duty to assist.

“In a claim for disability compensation, VA will provide a medical examination or obtain a medical opinion based upon a review of the evidence of record if VA determines it is necessary to decide the claim.” 38 C.F.R. § 3.159(c)(4). Once an examination is ordered, the examiner must produce an adequate medical opinion. “An opinion is adequate where it is based upon consideration of the veteran’s prior medical history and examinations and also describes the disability in sufficient detail so that the Board’s evaluation of the claimed disability will be a fully informed one.” *D’Aires v. Peake*, 22 Vet.App. 97, 104 (2008) (quotations omitted); *Steffl v. Nicholson*, 21 Vet.App. 120, 123-24 (2007). Here, VA complied with its obligations and obtained an adequate examination. (R. at 70-75). The Board did not err in relying upon it.

Appellant argues the Board erred when it relied on medical examinations that ignored evidence of hearing outside normal limits at separation from service. AB. at 19-22. Specifically, he argues that because the September 2013 and January 2016 examiners did not specify whether they converted the separation audiometric examination results, and because they concluded that there was no evidence of hearing loss at separation from service, their opinions are inadequate. AB. at 20. Although it is unclear whether those examiners converted Appellant’s September 1963 audiometric examination results to ISO/ANSI standards, it is clear that the Board’s analysis did not rely on the medical opinion of

either examiner. The Board reviewed the examinations provided by the September 2013 and January 2016 examiners, but relied on their findings only insofar as they provided a favorable diagnosis establishing Appellant's current disability of hearing loss. See [R. at 10 ("The VA examination reports show a diagnosis of . . . bilateral hearing loss")]. The Board's analysis however focused only on the opinion of the June 2016 examiner which, as conceded by Appellant, specifically considered the converted audiometric examination results at separation from service. [R. at 70-75]; AB. at 20. Since exclusion of the September 2013 and January 2016 examiners from the Board's review of the evidence could not result in a different outcome in the adjudication of Appellant's claim, he does not demonstrate prejudice. See [R. at 11-12].

Appellant next asserts the June 2016 examiner relied upon the absence of in-service complaints of hearing loss and the non-ratable separation hearing loss tests to find his hearing loss was not related to military service. AB. at 20-21. To the contrary, the examiner did not base his opinion solely on the lack of an in-service, ratable disability. [R. at 70-75]. In fact, he specifically recognized that "[e]ven if disabling hearing loss is not demonstrated at separation, a Veteran may establish service connection for a current hearing disability by submitting evidence that a current disability is causally related to service". [R. at 73]. In spite of this potential avenue for recovery, the examiner noted there was an "absence

of documentation in the [record] of any onset [of] hearing loss bilaterally in the first few years after separation”. *Id.* Given the 37-year gap in time between Appellant’s separation from service and his complaints of hearing loss, or the first identifiable moment at which ratable hearing loss occurred, the examiner opined it was less likely than not that the post-service diagnosis of hearing loss was etiologically related to in-service noise exposure. *Id.* From these statements, it is evident the examiner found in-service incurrence less likely than not because of the gap in time between service and post-service evidence of hearing loss. This is a valid factor for consideration, and does not rely on the absence of an in-service diagnosis of hearing loss under 38 C.F.R. § 3.385. See *Maxson v. Gober*, 230 F.3d 1330 (Fed. Cir. 2000) (prolonged and unaccounted for period of time without medical complaint can be considered as evidence that injury or disease was not incurred in service). Thus, Appellant fails to demonstrate the inadequacy of the examiner’s rationale. This remains true despite Appellant’s contention that the examiner violated the holding in *Hensley v. Brown*, 5 Vet.App. 155, 160 (1993), as the examiner’s opinion established that Appellant’s evidence did not “sufficiently demonstrate a medical relationship between [his] in-service exposure to loud noise and his current disability.” *Id.*

Finally, insofar as Appellant argues the examiner erred when he stated it was impossible to determine an in-service threshold shift in

hearing because there was no entrance examination, his argument lacks merit. AB. at 22. Although every veteran is presumed sound on entry to service except for those disabilities noted at entry to service, it does not then follow that a medical examiner must attribute every decibel above zero on audiometric examination to an in-service injury. See 38 U.S.C. § 1111. Moreover, the presumption of soundness applies when a veteran incurs a disability in the line of duty. *Gilbert v. Shinseki*, 26 Vet.App. 48, 52 (2012) (“Otherwise stated, before the presumption of soundness is for application, there must be evidence that a disease or injury that was not noted upon entry to service manifested or was incurred in service”). As discussed above, Appellant did not incur a disability under 38 C.F.R. § 3.385 in service. Therefore, even assuming that Appellant did experience a shift in hearing thresholds in service, it does not necessarily entitle him to service connection. Rather, as discussed by *Hensley, supra*, a threshold shift is simply a factor to be weighed alongside any evidence indicating a relationship between a post-service diagnosis of hearing loss and service.

B. This Court Should Affirm The Board’s Decision As it Provided An Adequate Statement Of Reasons Or Bases For Its Decision, Including The Weight Assigned To Various Pieces Of Evidence, And Appellant Has Not Demonstrated The Existence Of Prejudicial Error.

Appellant maintains the Board failed to provide an adequate statement of reasons or bases for denying his claim of entitlement to service connection for hearing loss because it failed to give probative

weight to the in-service notation of “partial deafness” in one ear, and otherwise failed to give credence to Appellant’s lay statements due to the lack of contemporaneous in-service evidence. AB. at 10-18. This, he asserts, resulted in the failure to award service connection on a presumptive basis under 38 C.F.R. § 3.303(b).

Pursuant to § 3.303(b), service connection may be awarded for a chronic condition that was first shown in service if the same chronic disease is apparent at a later date, however remote. However, to show chronic disease in service, the evidence must show “a combination of manifestations sufficient to identify the disease entity, and sufficient observation to establish chronicity at the time, as distinguished from merely isolated findings or a diagnosis included the word ‘chronic’”. *Id.*

The Board provided a thorough review of the evidence, which included the notation at separation from service regarding partial deafness in one ear [R. at 302], a VA nurse’s note that hearing loss was likely incurred in service [R. at 204], and the June 2016 nexus opinion, [R. at 70-75]. [R. at 5-10]. After acknowledging the notation of partial deafness in one ear in September 1963, the Board found that the audiometric results recorded at that time did not support that conclusion for the relevant range of hearing. [R. at 11]. The Board noted Appellant’s contention that his hearing loss existed since service but concluded that there was no evidence of hearing loss after service until September 2000, more than 30

years after service and Appellant himself asserted in 2013 that his tinnitus began five to ten years earlier. *Id.*; see also [R. at 404-05 (April 2013 Audio Consult; Appellant reported noticing hearing loss two years earlier)]; [R. at 282 (275-83) (Appellant reported onset of tinnitus five ten years earlier)]. The Board concluded that “[s]ervice connection is not warranted under 38 C.F.R. § 3.303(b), as there is no evidence showing that the Veteran’s hearing loss manifested in service.”

Appellant argues he is entitled to service connection under 38 C.F.R. 3.303(b) because there is a notation of in-service right ear partial deafness, sensorineural hearing loss is included as an organic disease of the central nervous system, and his lay evidence sufficiently establishes continuity of hearing loss symptoms. AB. at 12-14. However, the Board specifically addressed the notation at separation from service that he had partial deafness in one ear. See [R. at 11-12]. As discussed by the Board, the September 1963 audiometric results do not demonstrate a hearing loss disability. [R. at 11]. The Board acknowledged that generally severity is not determinative of whether service connection may be awarded, but hearing loss was an exception in that it required hearing loss in excess of the thresholds specified in 38 C.F.R. § 3.385. *Id.* As such, “the examiner’s reference to partial deafness on the separation examination” did not establish an in-service disability. *Id.* Without evidence of a hearing loss disability per VA standards in service or a year following service, the Board

found no basis for an award of presumptive service connection under 38 C.F.R. § 3.303(b). [R. at 12].

This conclusion is not disturbed by Appellant's erroneous reliance on *Hensley*, in which the Court found service connection for hearing loss was not precluded by a lack of in-service diagnosis commensurate with the regulatory provisions of 38 C.F.R. § 3.385. 5 Vet.App. at 164. Rather, the Court recognized that "a claimant may establish *direct* service connection for a hearing disability initially manifested several years after separation from service on the basis of evidence showing that the current hearing loss is causally related to an injury or disease in service." *Id.* (emphasis added). It did not however mandate that any evidence of hearing outside normal limits in service, although insufficient to satisfy the requirements of § 3.385, automatically entitled a claimant to *presumptive* service connection upon post-service diagnosis. *Id.*

Similarly, to the extent Appellant argues the Board violated the holding in *Buchanan v. Nicholson*, 451 F.3d 1331 (Fed. Cir. 2006), by rejecting his lay evidence of continuity based on the lack of contemporaneous medical evidence, he mischaracterizes both the Board's findings and the Court's holding in *Buchanan*. In measuring the credibility of layperson testimony, the lack of contemporaneous medical evidence is relevant, however, the mere lack of such evidence may not be the sole basis for discrediting the testimony. *Buchanan*, 451 F.3d at 1337. The

Board's analysis reflects that, in addition to the lack of complaints of hearing loss for "more than 30 years after separation", the Board relied on the medical opinion of the June 2016 VA examiner. [R. at 11]. See *Maxson*, 230 F.3d at 1333 (permitting consideration of the "the lengthy period of absence of complaint directed to the condition [the veteran] now raises"). Appellant has not demonstrated prejudicial error committed by the Board, and this Court should denial of entitlement to service connection for bilateral hearing loss and tinnitus.

Finally, the Board's denial of entitlement to service connection for tinnitus should be affirmed because Appellant points to no error in the Board's conclusions. Appellant argues only that the issue is inextricably intertwined with the issue of service connection for hearing loss. AB. at 22-23. This Court has held that "where a decision on one issue would have a 'significant impact' upon another, and that impact in turn 'could render any review by this Court of the decision [on the other claim] meaningless and a waste of judicial resources,' the two claims are inextricably intertwined." *Henderson v. West*, 12 Vet.App. 11, 20 (1998) (quoting *Harris v. Derwinski*, 1 Vet.App. 180, 183 (1991) (alteration in original)). However, as the Secretary maintains Appellant's arguments regarding the Board's denial of his claim for service connection for hearing loss are unsubstantiated, the Court need not reach the claim of entitlement to service connection for tinnitus.

CONCLUSION

WHEREFORE, the Secretary submits that the Board properly denied entitlement to service connection for hearing loss and tinnitus, and the decision on appeal should be affirmed.

Respectfully submitted,

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